



The Solid Waste Association of North America

August 28, 2000

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Title VI Guidance Comments
US Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Mailing Address

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**Re: Draft Title VI Guidance for EPA Assistance Recipients Administering
Environmental Permitting Programs and Draft Revised Guidance for
Investigating
Title VI Administrative Complaints Challenging Permits
Comments of
The Solid Waste Association of North America (SWANA)**

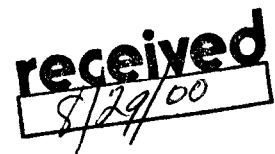
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Dear Ladies and Gentlemen:

The Solid Waste Association of North America appreciates the opportunity to submit the following comments on the above referenced draft guidance documents. SWANA is composed of over 6700 public and private sector solid waste management professionals throughout North America dedicated to the development and advancement of environmentally and economically sound practices and policies for the integrated management of municipal solid waste. SWANA submits these comments because the guidance documents are intended to address environmental justice issues during the state and local permitting process. Certain types of solid waste management facilities require environmental permits to operate issued by appropriate state and local regulatory agencies pursuant to EPA delegated programs

Members of SWANA fully support the implementation of environmental programs to protect the health of all citizens and the environment in a manner that fully complies with Title VI of the Civil Rights Act and does not subject any person to discrimination on the grounds of race, color, or national origin. SWANA also believes, however, that it is essential to maintain certainty in the state and local permitting process to allow permit holders to finance, construct, operate and maintain solid waste management facilities. Without such certainty, the essential public service these facilities provide cannot be relied upon by a community, potentially disrupting long term economic development, other environmental programs and over-all community planning.

General Comments on the Title VI Review Process Set Forth in the Guidance Documents





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The process laid out in the two guidance documents to ensure that state and local permitting agencies receiving EPA funding comply with EPA's Title VI implementing regulations significantly undermines the certainty of the permitting process required to deliver dependable solid waste management services. The lack of certainty created is a result of several factors:

- ◆ the criteria as to who may raise a claim of environmental discrimination are permissive and easily exploitable;
- ◆ the process to be followed by the state and local agencies is not clear;
- ◆ the process fails to address legal limitations on the state and local agencies' respective authorities;
- ◆ the financial ability of state and local agencies to carry out the various elements of the process without federal assistance is doubtful; and even if the state or local agency adopts the approaches for dealing with environmental equity issues set forth in the guidance documents, there is no guarantee that EPA will not step in and perform a *de novo* investigation.

Raising an Environmental Equity Claim

Under the guidance documents it is very simple for a particular permitting action to be charged with responding to a claim of environmental discrimination. Although a written complaint is required to "describe the alleged discriminatory acts that violates EPA's Title VI regulations," the guidance documents do not define what constitutes a "description." The complainant is not required to provide any information to support the allegation of discrimination, need not recommend less discriminatory alternatives, and does not have the burden to prove that the allegation is true. In addition, the complainant can be "any person who is a member of the specific class of people that was allegedly discriminated against" and does not have to be directly impacted by the alleged discriminatory action. Finally, even though the guidance stipulates that a complaint must be filed within 180 days of the alleged discriminatory act, the complainant has the option of a later filing if he alleges that there is a "continual violation" of Title VI. Clearly, these criteria provide no protection to the stability of the permitting process, nor insure that state or local agency's resources will be focused on legitimate circumstances of environmental discrimination.

Clarity of the Recommended Process

The lack of clarity of the recommended process for addressing environmental justice issues by the state and local permitting process in the guidance documents is in part based on the lack of definitions, clear definitions or examples of key terms used. Although a glossary is provided in the guidance documents, the furnished definitions themselves create confusion. For example, and of considerable importance, the guidance requires a determination of "adverse impact" and then stipulates that if an "impact is not significantly adverse" EPA is not expected to make a finding of non-





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compliance with its Title VI regulations. Yet the term “adverse impact” is itself defined to be an impact that EPA finds to be “significant.” Further, the term “significant” is cryptically defined as “*sufficiently* large and meaningful to warrant some action.” Thus, the meaning of one of the most pivotal terms - “significant adverse impact” - is internally inconsistent and circular under the provided definitions. Other key terms which are not clearly defined, or for which the guidance fails to provide adequate direction on how it is to be determined, is “comparison population” and “disparate impact.” In fact, the glossary defines the terms, respectively, as “a population selected for comparison ...,” and “a measurement of a degree of difference...”, begging the question on how such a selection is to be accomplished or what “degree” would be considered disparate. In the discussion on how a state or local agency might

be able to justify the disparate impact, neither the term “substantial” or “legitimate” in the phrase “substantial, legitimate justification” are defined.

A second reason the recommended process lacks clarity is that EPA hedges almost all of its recommendations or policy positions with phrases such as “will *generally* be considered protective;” “will be provided *due weight*,” “will *likely* be recognized;” “OCR *may* rely on it;” “EPA *expects* to provide;” and “the action will *not necessarily* be appropriate.” The italicized words remove any ability of a state or local agency to rely on use of the approaches recommended in the guidance to comply with Title VI.

Limitations of State and Local Permitting Agencies

The two guidance documents fail to adequately address the financial ability or the limits of authority of state and local permitting agencies in carrying out a significant number of the recommended approaches. At the same time, EPA provides no assurance that it will assess the approaches taken by an agency, in its attempt to comply with Title VI, in terms of implementation considerations such as cost and technical feasibility. Disconcertingly, the permitting agency’s resources are surely to be stressed to a greater degree as a result of the lack of clarity of the recommended process as described above, and the lead role EPA expects the agency to play in encouraging enforceable agreements among all stakeholders, including intergovernmental involvement, to resolve disparate impacts. Even if the agency takes a permit-specific approach, the potential still exists that the permitting agency will have to deal with several federal agencies at one time since EPA may refer some allegations in a complaint to other federal agencies. Notwithstanding, EPA declares that it has no option but to suspend or terminate financial assistance if the steps taken by the agency do not result in such compliance.

The impact and demographic analysis suggested in the guidance documents are complex and resource intensive. EPA admits in the guidance that there is no single place to obtain access to data sources and tools needed to address these concerns, and





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that some are incomplete, outdated or have other limitations, and some are still under development. It places the burden of finding the sources that exist and collecting the data, and the burden of developing analytical tools or modifying existing tools, on the state and local permitting agency while emphasizing that any analysis and evaluation done by the agency must conform to “accepted scientific approaches.” A sense of the extent of resources a permitting agency will have to dedicate is the description of the scope of the adverse disparate impact investigation EPA would undertake. EPA states that its investigation would involve “formation of a project team; assessing data availability, relevance and reliability; and reviewing the availability of assessment tools, such as appropriate mathematical models and exposure scenarios,” and a “discussion of uncertainties in the impact assessment.”

The limits of a permitting agency’s legal authority are also given little consideration in the recommendations for actions to comply with Title VI. The guidance urges the permitting agency to focus on all contributions to the disparate impact, not just the permit issue, as well as cumulative impacts, in order to develop the “most effective long-term” and “comprehensive resolution.” EPA encourages the agency to develop enforceable agreements among all

stakeholders, including intergovernmental involvement, to resolve disparate impacts of pollution. EPA states in the guidance that the agreement need not be limited to one environmental media. Importantly, EPA expects the adverse disparate impact analysis to involve not only the stress and impacts that are within an agency’s permitting authority, but also the stress and impacts that are not explicitly covered by the permitting program but for which the agency has “some obligation” to address under “broader, cross-cutting” laws and regulations. (Neither of the quoted phrases are defined.) The EPA in assessing an agency’s compliance with its Title VI regulations, and in potentially finding a legitimate justification for the permit action at issue, is willing to not only consider the permit action in the context of the agency’s institutional mission, but also broader interests, such as economic development. However, EPA makes clear in the *Summary of Key Stakeholder Issues* that it will not consider factors bearing on a finding of adverse disparate impact outside the legal authority of the permitting agency, such as market forces and zoning and other land use laws, whether or not those factors exist or were created to further a community’s economic development plans.

Lack of EPA Deference to Responsive Actions Taken by State and Local Agencies

If the state or local agency adopts the approaches for dealing with environmental equity issues set forth in the guidance documents, there is no guarantee that EPA will accept the actions of the agency as sufficient to comply with its Title VI regulations. The guidance states that EPA retains the ability to supplement a state or local agency’s analysis or to investigate the issues *de novo*, to approve any proposed solution, and to initiate its own enforcement actions and compliance reviews. EPA





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may also choose to proceed with a complaint investigation even if the allegations in the complaint were actually litigated and substantially decided by a court of law.

Even if a particular state or local agency adopts an activity described in the guidance and EPA finds that the activity ensures non-discrimination, EPA may choose not to rely on this finding and may not dismiss future allegations related to the issues covered by the activity. EPA states it will ignore its prior findings if it unilaterally determines that circumstances had "changed substantially" so that the activity is "no longer adequate." (Neither of the quoted phrases are defined.) In addition, any evidence that a state or local agency has adopted an activity described in the guidance will only be given "due weight" in EPA's compliance assessment. Finally, the guidance documents indicate that once a Title VI complaint is filed, EPA could use the event, even if the permit is abandoned, to undertake a comprehensive review of the agency's permitting program or of other "allegations" that are not specific to the permit at issue. Consequently, since the guidance documents provide no assurance that EPA will not "second-guess" state or local agency actions taken pursuant to the documents, these agencies are likely to limit or avoid their use, undermining their intended value.

Conclusion

The guidance documents present an ambiguous and vulnerable process for state and local regulatory agencies to follow in the hope of complying with EPA's Title VI regulations. The lack of clear requirements and measures of compliance, the complexity and cost of the necessary

analysis, and the insufficiency of the necessary data bases has forced EPA to take a role with wide discretion to intervene or supplant the actions taken by state and local permitting agencies to resolve environmental equity issues. In short, the guidance documents fail to maintain the certainty of the state and local permitting process needed for investment in, and long-term reliance on, a community's solid waste management facilities. SWANA urges EPA to provide a clearer and more structured process which can give the assurance to the states and local regulatory agencies that, if adopt and faithfully carried out, their permitting actions will comply with Title VI of the Civil Rights Act.

Sincerely,

John H. Skinner, Ph.D.
Executive Director and CEO

